STATE OF MICHIGAN

COURT OF APPEALS

ESTATE OF BRADLEY CORL, by Kimberly Corl, Personal Representative, Plaintiff-Appellee, v HURON & EASTERN RAILWAY and RAILAMERICA, INC., Defendants-Appellants.	UNPUBLISHED December 23, 2014 No. 319004 Tuscola Circuit Court LC No. 11-026733-NI

Before: O'CONNELL, P.J., and BORRELLO and GLEICHER, JJ.

GLEICHER, J. (*concurring).*

I concur with the majority opinion. I write separately to more fully respond to defendants' argument that MCL 462.317(1) abrogated the railroad's common-law duty to remove visually obstructing vegetation.

"The common law remains in force until modified." *Dawe v Dr Reuven Bar-Levav & Assoc, PC*, 485 Mich 20, 28; 780 NW2d 272 (2010). Whether a statute has abrogated the common law depends on legislative intent, but "amendment of the common law is not lightly presumed." *Id*. The Legislature is assumed to know the common law when it enacts a related statutory provision, and is expected to "speak in no uncertain terms" if it intends its enactment to alter the common law. *Id.* (quotation marks and citation omitted).

Here, as in *Dawe*, the question presented revolves around whether a statute trumps a common-law duty. In *Dawe*, a unanimous Supreme Court considered whether a subsection of the Mental Health Code, MCL 330.1946, abrogated a mental health professional's duty to warn third persons to protect them from harm caused by patients. *Id*. at 25-26. This Court held that "MCL 330.1946 preempts the field on the issue of a mental-health professional's duty to warn or protect others[.]" *Dawe v Dr Reuvan Bar-Levav & Assoc, PC*, 279 Mich App 552, 568; 761 NW2d 318 (2008). The Supreme Court disagreed, holding that a common-law duty of care remained even after the statute's enactment. *Dawe*, 485 Mich at 27. Despite that the statute specifically eliminates a mental health professional's duty to warn third persons of threats of violence, the Supreme Court held that "the language of the statute expressly limits its own scope." *Id.* The statute retained a duty to warn of "threats of physical violence against a reasonably identifiable third person" emanating from a patient with "the apparent intent and

ability to carry out that threat in the foreseeable future." *Id*. at 29. The plaintiff's decedent in *Dawe* was not a third person, but another patient. The Supreme Court summarized:

> MCL 330.1946(1) is not comprehensive and does not cover all the details of a mental health professional's duty to provide reasonable care. In fact, the statutory language is expressly limited to warning or protecting third persons under very limited circumstances, i.e., when (1) a patient makes a threat of physical violence, (2) the threat is against a reasonably identifiable third person, and (3) the patient has the apparent intent and ability to carry out the threat. The statutory language never addresses a mental health professional's other common-law duties to his or her patients. Therefore, on its face, the statute only defines a mental health professional's duty to warn or protect a third person from a "threat as described in [MCL 330.1946(1)]." Nothing in the statute indicates that the Legislature intended to completely abrogate a mental health professional's common-law special relationship duty to his or her patients. [*Id*. at 32.]

The statute at issue here provides:

> If a road authority determines to establish a clear vision area as described in this section, the railroad and a road authority may agree in writing for clear vision areas with respect to a particular crossing. The portions of the right-of-way and property owned and controlled by the respective parties within an area to be provided for clear vision shall be considered as dedicated to the joint usage of both railroad and road authority. [MCL 462.317(1).]

Notably, the statute begins with the word "if." This Court recently noted when construing a different statute that "[t]he Legislature's use of the word 'if' at the start of the subsection and the relevant clause is crucial." *In re Casey Estate*, 306 Mich App 252, ___ ; ___ NW2d ___ (2014), slip op at 5. So too, here. As explained in *Casey*, according to the "more pertinent" definition, the term "if" means "in case that; granting or supposing that; on condition that[.]" *Id*. (quotation marks and citation omitted). The Legislature's use of the word "if" at the outset of MCL 462.317(1) sets forth a condition upon which the remainder of the subsection is premised. Absent satisfaction of the stated condition, the remainder of the subsection simply does not come into play.

The "clear vision area" statute commences as follows: "If a road authority determines to establish a clear vision area as described in this section, the railroad and a road authority may agree in writing for clear vision areas with respect to a particular crossing." MCL 462.317(1). No evidence exists that a road authority determined to establish a clear vision area at the Lobdell Road crossing. Accordingly, this statute has no effect whatsoever in this case.

Moreover, *Dawe* teaches that if the Legislature intended to abrogate a railroad's common-law duty to remove obstructing vegetation, it would have done so in a clear and straightforward fashion. MCL 462.317(1) does not speak to the common-law duty of a railroad to maintain a crossing area. The duty described arises only if and when a road authority has established a clear vision area. That did not occur in this case. As the Supreme Court elucidated

in *Dawe*, the statute's self-limiting language cannot be reasonably construed as completely abrogating a related but unaddressed common-law duty.

As the majority opinion correctly points out, *Paddock v Tuscola & Saginaw Bay R Co, Inc*, 225 Mich App 526; 571 NW2d 654 (1997), is not to the contrary. In that case, the plaintiff's claim was that "because the railroad knew that the obstructing vegetation at the crossing made it extra hazardous, the trial court should have found that the railroad had a duty to request that a clear vision area be created to protect the public." *Id*. at 533. Here, plaintiff has framed her claim as one arising only under the common law, rather than under the "clear vision area" duty described in the statute. Accordingly, as the majority concludes, *Paddock* is fully distinguishable.

/s/ Elizabeth L. Gleicher